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**Magnum Transportation, Inc. and Excavating, Grading, Asphalt, Private Scavengers and Recyclers, Automobile Salesroom Garage Attendants, Linen and Laundry and Machinery, Scrap Iron, Steel and Metal Trade Chauffeurs, Handlers, Helpers and Alloy Fabricators, Teamsters Local Union No. 731.** Case 13–RC–113924

May 30, 2014

DECISION AND CERTIFICATION OF  
REPRESENTATIVE

BY MEMBERS MISCIMARRA, HIROZAWA,  
AND SCHIFFER

The National Labor Relations Board, by a three-member panel, has considered objections and a determinative challenged ballot in an election held November 8, 2013, and the hearing officer’s report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 7 for and 6 against the Union, 1 void ballot, and 1 challenged ballot, a sufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs,<sup>1</sup> has adopted the hearing officer’s findings<sup>2</sup> and recommendations,<sup>3</sup> and finds that a certification of representative should be issued.

<sup>1</sup> The Employer filed four objections to the conduct of the election. The Employer withdrew Objection 3 at the hearing. In the absence of exceptions, we adopt pro forma the hearing officer’s recommendations to overrule Objections 2 and 4.

<sup>2</sup> The Employer has implicitly excepted to some of the hearing officer’s credibility findings. The Board’s established policy is not to overrule a hearing officer’s credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully examined the record and find no basis for reversing the findings.

<sup>3</sup> We agree with the hearing officer’s recommendation to sustain the Board agent’s challenge to Anthony Inendino’s ballot. In doing so, we agree with our colleague that this case is akin to the situation presented to the Board in *Magic Pan, Inc.*, 244 NLRB 630, enf. per curiam 627 F.2d 105 (7th Cir. 1980). However, we find *K. Van Bourgondien & Sons*, 294 NLRB 268 (1989), also cited by our colleague, to be easily distinguishable on its facts. There, a voter mistakenly placed her challenged ballot in the ballot box without first putting it into the required envelope. It was then carefully retrieved by the Board agent without disturbing other ballots: the ballot was located at the top of the pile inside the box and could be positively identified by a folded corner. The vote itself was never revealed to anyone except the challenged voter. The Board “emphasize[d]” all of these “particular circumstances” in concluding that the “balloting process was not compromised.” 294 NLRB at 269.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Excavating, Grading, Asphalt, Private Scavengers and Recyclers, Automobile Salesroom Garage Attendants, Linen and Laundry and Machinery, Scrap Iron, Steel and Metal Trade Chauffeurs, Handlers, Helpers and Alloy Fabricators, Teamsters Local Union No. 731, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time drivers engaged in grinding, asphalt excavating, and contaminated soil removal, employed by the Employer at its facility currently located at 3619 South Normal Avenue, Chicago, Illinois; but excluding all other employees, including office and clerical employees, professional employees, guards, and supervisors as defined in the Act.

Dated, Washington, D.C. May 30, 2014

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Philip A. Miscimarra, Member

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Kent Y. Hirozawa, Member

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Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring.

I concur in this case, which presents a very close, difficult question regarding the appropriate balance to be struck between the Board’s responsibility to assure employees the “fullest freedom” in the exercise of their right to participate in a Board-conducted election (National Labor Relations Act, Sec. 9(b), 29 U.S.C. § 159(b)) and the duty to maintain integrity and procedural regularity in elections.

Here, we have a small unit, where the outcome of the election depends on a single vote. And, consistent with Murphy’s Law (“Anything that can go wrong will go

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We also agree with the hearing officer’s recommendation to overrule Objection 1. We find it unnecessary to pass on whether the allegation the Employer asserts is sufficiently related to Objection 1 is properly before us. Even assuming it is, we agree with the hearing officer that the alleged conduct does not warrant setting aside the election.

wrong”),<sup>1</sup> one eligible voter, Anthony Inendino—after receiving a folded ballot and asking for direction from the Board agent—very literally followed the agent’s instructions. The agent advised Inendino to “just go in the back and put an X on the paper,” and Inendino—without unfolding the ballot—apparently placed an “X” on the outside of the folded ballot, which obviously failed to reflect whether he favored or disfavored union representation. Shortly after placing this ballot in the ballot box, Inendino spoke with coworkers, realized his error, returned to the Board agent, and was permitted to cast a second, challenged ballot. The postelection tally of votes showed there was one voided ballot. Furthermore, one of the ballots (consistent with Inendino’s reported error) was marked with an “X” on its reverse side.

Our cases dealing with issues such as this one are not entirely consistent. As recognized by the hearing officer, many cases emphasize the importance of preserving the integrity of votes—whether right or wrong, erroneous or not—once they have been placed in the ballot box. This case perhaps most closely resembles *Magic Pan, Inc.*, 244 NLRB 630 (1979), enf. per curiam 627 F.2d 105 (7th Cir. 1980), also involving a one-vote difference in the final tally, where the Board with Seventh Circuit approval upheld an election even though one non-English-speaking voter was visibly confused, apparently marked both the “yes” and “no” boxes, realized her mistake, and the Board agent refused to permit the voter to correct her error.

On the other hand, the Employer relies on *K. Van Bourgondien & Sons*, 294 NLRB 268 (1989), where a “challenged” ballot was mistakenly deposited in the ballot box without having been placed in a challenge envelope. (A challenged ballot is supposed to be placed in a sealed envelope so its disputed status can later be resolved by the Board.) The Board majority held that the Board agent did not act improperly by “fishing” the ballot out of the ballot box based on the voter’s physical description of the ballot (according to the voter, a corner of the ballot had been folded over).

I believe the close question raised by the challenge to Inendino’s second ballot is appropriately resolved in favor of sustaining the ballot challenge, not counting the second vote, and overruling Objection 1 for the reasons stated by the hearing officer and upheld by my colleagues. Preliminarily, although the evidence strongly suggests that Inendino’s initial ballot was, in fact, the “void” ballot that was reflected in the final tally, this is not conclusively established in the record. Moreover, in most cases an attempt to identify an “erroneous” ballot

would predictably require after-the-fact scrutiny to a degree that would detract from the integrity of the Board’s election process. In a different context, I have emphasized the importance of upholding the integrity of the election process when voting has been concluded and the ballot box has been opened. See *Patient Care of Pennsylvania*, 360 NLRB No. 76, slip op. at 2–3 fn. 4 (2014) (Member Miscimarra, concurring). Most importantly, the Board has an interest in affording finality to ballots that have been placed in the sealed ballot box. I share the hearing officer’s concern that a contrary result could expose voters to after-the-fact electioneering (or worse), resulting in competing requests to withdraw or change “erroneous” votes.

Were it necessary to decide the issue, I would find that the Employer’s new allegation of objectionable conduct (challenging the Board agent’s folding of the ballots and his instructions to Inendino) is sufficiently related to Objection 1 (challenging the failure to open and count Inendino’s ballot) to warrant consideration by the Board. However, like my colleagues, I would not set aside the results of the election based on the Board agent’s conduct. Board elections must be procedurally regular, but it is not realistic to require Board agents to prevent every type of potential confusion that may beset every type of voter, nor can they be required to remedy every situation where a ballot has been mistakenly cast based on such confusion. Without faulting Mr. Inendino, one can reasonably anticipate that voters in an election would realize they should mark the side of the ballot that identifies the choices being voted upon.

It is also relevant that, at the election location, a sample ballot was posted in English and Spanish.

For these reasons, I concur.

Dated, Washington, D.C. May 30, 2014

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Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

## APPENDIX

### HEARING OFFICER’S REPORT ON CHALLENGE AND OBJECTIONS<sup>1</sup>

This report contains my findings and recommendations regarding the challenged ballot of Anthony Inendino and

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<sup>1</sup> See [http://en.wikipedia.org/wiki/Murphy's\\_law](http://en.wikipedia.org/wiki/Murphy's_law).

<sup>1</sup> In this report, the Employer will be referred to as “Employer,” and Petitioner will be referred to as “Petitioner” or “Union.”

the Employer's Objections<sup>2,3</sup> regarding conduct affecting the results<sup>4</sup> of the election<sup>5</sup> conducted under the direction of the Regional Director for Region 13 of the National Labor Relations Board on November 8, 2013, among the employees in the stipulated unit.<sup>6</sup>

A hearing<sup>7</sup> was held by the undersigned on January 9, 2014, in Chicago, Illinois. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce all relevant evidence bearing on the issues in this case.

The findings of fact, credibility resolutions and recommendations to the Board contained in this report are based upon my review and evaluation of all testimony in light of the demeanor of witnesses, the logical probability of testimony, and the record as a whole. Where any witness has testified in contradiction to the findings herein, his or her testimony has been discredited as being either in and of itself not worthy of credence or because it conflicted with the weight of other credible evidence.<sup>8</sup>

#### THE CHALLENGED BALLOT OF ANTHONY INENDINO

As stated in the Regional Director's Report on Challenge and Objections and Notice of Hearing, the Employer asserts that Anthony Inendino's challenged ballot should be opened and counted based on its assertion that

voters should be afforded the maximum opportunity to cast their votes on the issue of union representation because Inendino's first ballot was voided due to his mistake when he marked the back of his first ballot.

Anthony Inendino, a truck driver in the bargaining unit, testified that he voted during the election. When he came into the voting area for the first time, the Board Agent handed him a folded piece of paper and told him to "just go in the back and put an X on the paper." After entering the voting booth and looking at the blank piece of paper, Inendino testified that he asked the Board Agent for clarification from within the voting area. After the Board Agent repeated the instructions, Inendino was admittedly still confused, but he followed the instructions literally and marked an X on the folded ballot, without ever opening the ballot. After marking his ballot, Inendino dropped it into the ballot box.

Later, after he cast his ballot and left the voting area, Inendino testified that he explained his confusion to a fellow employee, and the employee clarified that he was supposed to open the folded ballot and make a selection. Upon realizing he made a mistake, he returned to the voting area and requested another ballot. The Board Agent conducting the election allowed him to vote under the Board's challenge procedure, utilized when a voter's eligibility to vote may be called into question.<sup>9</sup>

The Employer argues that Inendino's second ballot should be opened and counted. However, the Board has long held that voters may not withdraw their ballot after voting. *Great Eastern Color Lithographic Corp.*, 131 NLRB 1139 (1961), *T&G Manufacturing*, 173 NLRB 1503 (1969). To allow Inendino to cast a second ballot, he must first withdraw his first ballot, an action clearly prohibited by the Board. Inendino had the opportunity to withdraw his ballot prior to casting and per procedure he would have been provided another ballot by the Board Agent. Unfortunately, he realized his mistake too late and policy considerations must override to preserve the integrity of the election process. Further, to accept his testimony regarding this ballot is inconsistent with the Board's purpose of preserving the secrecy of voter's ballots and providing sufficient safeguards to prevent possible abuses of the election processes. *T & G Manufacturing*, supra. Even assuming arguendo that Inendino's testimony regarding the incorrect markings on his first ballot were fully credited, the Board has held that even when employees credibly testified that they were denied the right to vote a first time, employees may not be permitted to cast a potential second ballot. *Monfort, Inc.*, 318 NLRB 209 (1995).

<sup>2</sup> On November 18, 2013, the Employer filed timely objections to conduct alleged to have affected the results of the election. On December 6, 2013, the Regional Director issued a Report on Challenge and Objections and Notice of Hearing, in which he ordered a hearing be conducted before a duly-designated Hearing Officer for the purpose of receiving testimony to resolve the issues raised by the Determinative Challenge and Objections.

<sup>3</sup> The Employer withdrew Objection 3 at the hearing.

<sup>4</sup> The tally of ballots shows that there were approximately 15 eligible voters—7 ballots were cast for the Petitioner, 6 ballots were cast against the participating labor organization, 1 ballot was void, and 1 challenged ballot was sufficient to affect the results of the election.

<sup>5</sup> The election was conducted pursuant to an Amended Petition filed on September 23, 2013, and a Stipulated Election Agreement approved on September 30, 2013. The payroll eligibility date for the election was September 20, 2013.

<sup>6</sup> The stipulated bargaining unit included all full-time and regular part-time drivers engaged in grinding, asphalt excavating, and contaminated soil removal, employed by the Employer at its facility currently located at 3619 South Normal Avenue, Chicago, Illinois; but excluding all other employees, including office and clerical employees, professional employees, guards, and supervisors as defined in the Act.

<sup>7</sup> Following a preliminary investigation of the one challenged ballot and the Employer's Objections, the Regional Director concluded that the challenged ballot and objections involved substantial and material issues, which could best be resolved on the basis of record testimony and/or other evidence developed at a hearing and on December 6, 2013, issued a Report on Challenge and Objections and Notice of Hearing. The Notice of Hearing directed the Hearing Officer to prepare and serve upon the parties a report containing resolution of credibility of witnesses, findings of fact and recommendations to the Board concerning the disposition of the objections.

<sup>8</sup> *Bishop and Malco, Inc. d/ba Walker's*, 159 NLRB 1159 (1966).

<sup>9</sup> NLRB Casehandling Manual, Section 11338.

Opening Inendino's challenged ballot would have the effect of undermining the Board's established procedures for the conduct of the election. It would be in clear contradiction of Board procedures because it would undermine the presumption of fairness and regularity of Board conducted elections. Furthermore, it would encourage employees in future elections to discuss their ballots with each other and create an avenue for potential fraud and abuse. Consequently, I recommend that the challenge to Inendino's ballot be sustained.

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#### Objection #1

The Employer's first objection to the conduct of the election relates directly to Inendino's challenged ballot described above, alleging that the Board Agent engaged in misconduct when he improperly disenfranchised employee Anthony Inendino by failing to open and count his challenged ballot at the conclusion of the election.

The tally of ballots shows that there was only one void ballot, presumably Inendino's. The Employer argues that Inendino's first ballot should be treated like a spoiled ballot. NLRB Casehandling Manual, Section 11322.3, states "A voter who spoils his/her ballot and returns it to the Board agent should be given a new ballot." As discussed above, Anthony Inendino did not avail himself this option in a timely manner, i.e. before casting his ballot. Here, Inendino did not return a spoiled ballot to the Board Agent and it is undisputed that he actually cast his ballot. Once a ballot is cast, the voter loses control of the ballot. *Eastern Color Lithographic Corp.*, supra. For the Board Agent to have handled the ballot like a spoiled ballot, he would have had to retrieve it, which would have compromised the integrity of the election process and constituted conduct which would destroy confidence in the Board's election process. *Jakel, Inc.*, 293 NLRB 615 (1989).

The Employer alleges that the Board Agent engaged in misconduct when he failed to open Inendino's challenged ballot. On the contrary, I find that there is insufficient evidence that the Board Agent did not follow the procedures described in NLRB Casehandling Manual, Section 11340, pertaining to challenged ballots. The Board Agent found that there was a question concerning Inendino's eligibility to cast a second ballot, thus he allowed Inendino to cast a second ballot subject to challenge, and the investigation regarding the challenged ballot was properly referred to the Regional Director.

Although not raised in its original objection, the Employer argues in its brief that the Board Agent engaged in

misconduct by causing voter Anthony Inendino's confusion. I do not have the authority to consider this allegation as it is insufficiently related to the Objections set for hearing by the Regional Director. This allegation involves a new legal theory and different factual circumstances. See *Iowa Lamb Corp.*, 275 NLRB 185 (1995); *Precision Products Group*, 319 NLRB 640 (1995).

Assuming arguendo that the Board Agent's instructions are reasonably encompassed within the scope of the objections, I do not believe that any of the Board Agent's actions raised any doubt as to the fairness and validity of the election. Compare *Polymers, Inc.*, 174 NLRB 282 (1989), where the Board Agent failed to follow procedures and abandoned the ballots and ballot box and the Board still did not find objectionable conduct. Although it is unfortunate that Inendino did not know how to cast his ballot, he had access to the Notice of Election, the NLRB's method of informing voters of balloting details.<sup>10</sup> There is simply no evidence here that the Board Agent failed to follow any established procedures and/or disenfranchised Inendino in any way. The fact that Inendino took the Board Agent's instructions too literally is Inendino's admitted own mistake, and not the fault of the Board Agent. The Board Agent could not have foreseen that his instructions could be taken so literally. The Board acknowledges "we must avoid unrealistic standards which insist on improbable purity of word and deed on the part of the parties or Board agents. Otherwise, in any hard-fought campaign involving a large number of voters, it would be impossible to conduct an election which could not be invalidated by a party disappointed in the election results." *Newport News Shipbuilding*, 239 NLRB 82 (1978).

Based on the facts above, I recommend that Employer's Objection #1 be overruled.

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#### CONCLUSION

Based on the foregoing, I conclude and recommend that the determinative challenged ballot of Anthony Inendino be sustained, that the Employer's Objections be overruled in their entirety, and that a Certification of Representative should issue.

<sup>10</sup> CHM Section 11314, Notice of Election, states "A standard notice of election Form NLRB-707 is used to inform eligible voters of the balloting details" and "Notices must be posted by the employer 3 full working days prior to the day of the election and failure to do so shall be grounds for setting the election aside whenever proper and timely objections are filed." There is no allegation that this Notice posting requirement had not been fulfilled.